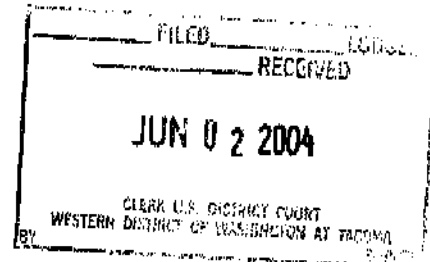




04-CV-05316-CMP



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JACK BARGERON,)	No.	C04 - 5316 FDB
)		
Plaintiff,)		
)		
v.)	COMPLAINT	
)		
WAL-MART STORES, INC.,)		
)		
Defendant.)		
)	JURY DEMAND	

INTRODUCTION

1. This action is commenced by plaintiff Jack Bargerion against defendant Wal-Mart Stores, Inc. (Wal-Mart) seeking damages and equitable, injunctive, and declaratory relief as a result of Wal-Mart's failure to accommodate his disability and because of Wal-Mart's discrimination against plaintiff in training, supervision, and advancement because of his disability. This action is brought under Sections 102, 107, and 505 of the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. §§12112, 12117, and 12205 (hereafter "ADA") and the Washington Law Against Discrimination, Chapter 49.60, RCW (hereafter "WALAD").

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COMPLAINT --1

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RCP# 51145

S/ISSA

**FIRST CLAIM FOR RELIEF—
AMERICANS WITH DISABILITIES ACT
JURISDICTION**

2. This court has jurisdiction under the provisions of 28 U.S.C. §§1331 and 1343.

PARTIES

3. Plaintiff Jack Barger on has resided in the State of Washington at all times material to the allegations of this complaint.

4. Defendant Wal-Mart Stores, Inc. is a Delaware corporation registered with the Washington Secretary of State. Defendant operates retail stores in several locations within the State of Washington, including stores located on Northeast 104th Avenue in Vancouver, Washington and a store in Spokane, Washington. Defendant Wal-Mart is a person engaged in an industry affecting commerce.

5. Defendant Wal-Mart has, and at all times material to this dispute has had, more than 500 employees.

6. Defendant Wal-Mart is an employer within the meaning of Section 101(5) of the ADA. 42 U.S.C. §12111(5).

FACTS

7. Plaintiff Barger on has been deaf since birth.

8. Plaintiff's deafness substantially limits him in the major life activity of hearing.

9. Plaintiff's deafness substantially limits him in other major life activities including, but not limited to, speaking, communicating with others, learning, and working.

10. Plaintiff has a disability. He is deaf.

11. In the course of considering plaintiff Barger on's application for employment in 1998, defendant Wal-Mart learned that he was deaf.

12. In August 1998 Defendant Wal-Mart hired plaintiff Barger on to work in the

COMPLAINT --2

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1 maintenance department of its store located at Northeast 104th Avenue in Vancouver
2 Washington.

3 13. When Defendant Wal-Mart hired plaintiff Barger on in August 1998, defendant
4 knew he was deaf.

5 14. When Defendant Wal-Mart hired plaintiff Barger on in August 1998, defendant
6 knew that as a result of his being deaf, he would require accommodation for his deafness so that
7 he could enjoy employment opportunities equal to the opportunities available to Wal-Mart
8 employees who can hear.
9

10 15. At the time Defendant Wal-Mart hired plaintiff Barger on in August 1998,
11 defendant knew the nature of accommodations required by its deaf employees. At that time,
12 defendant was defending claims of disability discrimination against deaf employees brought by
13 the Equal Employment Opportunity Commission in U.S. District Court for the District of
14 Arizona, *EEOC v. Wal-Mart Stores, Inc.*, CIV-98-0276-TUC WDB.

15 16. In January 1999, five months after plaintiff was hired, Defendant Wal-Mart
16 consented to the entry of judgment in *EEOC v. Wal-Mart Stores, Inc.*, CIV-98-0276-TUC WDB,
17 in which Wal-Mart recognized its "on-going obligations to a) not discriminate against persons on
18 the basis of deafness in the hiring and accommodation process."

19 17. Defendant Wal-Mart provided plaintiff Barger on with an interpreter for part of his
20 initial training shortly after he was hired in August 1998.

21 18. Despite repeated requests by plaintiff Barger on and by others on his behalf, with
22 the exception of the initial training described in the preceding paragraph, defendant Wal-Mart
23 has failed to accommodate plaintiff's disability by providing him an interpreter at department
24 meetings, safety meetings or when needed in connection with his employment on other occasions
25 such as on the job training, on the job instruction and counseling, discussions of his performance
and evaluation of his performance, and advancement within Wal-Mart.

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1 19. Despite repeated requests by plaintiff Barger on and by others on his behalf, other
2 than the initial training described in the preceding paragraph, defendant Wal-Mart has failed to
3 otherwise accommodate plaintiff's disability at department meetings, safety meetings or when
4 needed in connection with his employment on other occasions such as on the job training, on the
5 job instruction and counseling, discussions of his performance and evaluation of his
6 performance, and advancement within Wal-Mart.

7 20. Defendant Wal-Mart has failed to provide plaintiff Barger on with equal
8 opportunities for advancement at Wal-Mart whether by increasing his wages in his current
9 position, promotion, or transferring to other positions at Wal-Mart.

10 21. Despite Defendant Wal-Mart's failure to accommodate his disability and
11 discrimination against him because of his disability, plaintiff Barger on has successfully
12 performed the essential functions of his job at Wal-Mart.

13 22. Defendant Wal-Mart has limited, segregated and classified plaintiff in a way that
14 adversely affects his employment opportunities at Wal-Mart because of his disability.

15 23. Defendant Wal-Mart has failed to make reasonable accommodations to plaintiff's
16 known physical limitations.

17 24. As a result of defendant Wal-Mart's failure to accommodate his disability and
18 discrimination against him because of his disability, plaintiff has suffered emotional distress,
19 mental anguish and humiliation.

20 25. Defendant Wal-Mart acted with reckless or callous indifference to plaintiff's
21 rights under federal law: therefore plaintiff is entitled to an award of punitive damages under the
22 ADA.

23 26. Plaintiff Barger on is suffering irreparable injury and is threatened with irreparable
24 injury in the future by reason of defendant Wal-Mart's failure to accommodate his disability and
25 discrimination against him because of his disability.

1 27. Plaintiff has no adequate remedy at law.

2 28. Plaintiff filed a disability discrimination complaint with the Equal Employment
3 Opportunities Commission (EEOC). On March 4, 2004, the EEOC issued plaintiff a right to sue
4 notice (copy attached as Exhibit A).

5 **VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT (ADA)**

6 29. The allegations of paragraphs 1—28 are incorporated herein by reference.

7 30. Plaintiff Bargeron has a disability within the meaning of Section 3(2) of the ADA.
8 42 U.S.C. §12102(2).

9 31. Plaintiff Bargeron is a qualified individual with a disability within the meaning of
10 Section 101(8) of the ADA. 42 U.S.C. §12111(8).

11 **FIRST ADA VIOLATION—FAILURE TO MAKE**
12 **REASONABLE ACCOMMODATION**

13 32. At all times material hereto, defendant Wal-Mart knew that plaintiff Bargeron is
14 deaf.

15 33. Despite plaintiff's requests and requests made on his behalf, defendant Wal-Mart
16 failed to accommodate his disability.

17 34. Defendant Wal-Mart failed to make a good faith effort to identify potential
18 accommodations and implement effective reasonable accommodations needed to enable plaintiff
19 Bargeron to enjoy employment opportunities equal to those enjoyed by employees who can hear

20 35. By its failure to accommodate plaintiff Bargeron's known disability, its failure to
21 make a good faith effort to identify and implement accommodations, and its actions described
22 above, defendant has failed to make reasonable accommodation in violation of Sections
23 102(b)(5)(A) and 102(a) of the ADA. 42 U.S.C. §12112(b)(5)(A) and 12112(a).

24 ////

25 ////

**SECOND ADA VIOLATION—LIMITING, SEGREGATING AND
CLASSIFYING BECAUSE OF DISABILITY**

36. Defendant Wal-Mart, by its failure to accommodate plaintiff Barger on for a period of five years has limited, segregated and classified him because of his disability in violation of Sections 102(b)(1) and 102(a) of the ADA. 42 U.S.C. §12112(b)(1) and 12112(a).

37. Plaintiff is entitled to an award of his attorney's fees, litigation expenses, and costs under Section 505 of the ADA. 42 U.S.C. §12205.

38. As a direct and proximate result of defendant Wal-Mart's violation of plaintiff Barger on's rights under the ADA, plaintiff has suffered damages, and will continue to suffer additional damages so long as defendant continues its illegal discrimination, in the form of loss of wages and associated benefits (plus interest), emotional distress, mental anguish, and humiliation, plus attorneys' fees, litigation expenses and costs.

39. WHEREFORE, plaintiff Barger on prays for the following relief against defendant Wal-Mart:

1. A jury trial to determine the factual questions raised herein.

2. A declaratory judgment that defendant's above described acts have violated plaintiff's rights under the ADA;

3. A permanent injunction prohibiting defendant, its agents, assistants, successors, and all persons acting in concert or cooperation with it or at its direction or under its control from discriminating against plaintiff in violation of the ADA;

4. A money judgment against defendant, compensating plaintiff for all wages and benefits including loss of future earnings—plus interest, to which he would have been entitled were it not for defendant's discrimination in violation of the ADA;

1 5. A money judgment against defendant for compensatory and punitive
2 damages;

3 6. A money judgment against defendant for all costs and reasonable
4 attorney's fees incurred in the prosecution of this action; and

5 7. All other relief that this Court may deem just and proper.

6 **SECOND CLAIM FOR RELIEF—**
7 **WASHINGTON LAW AGAINST DISCRIMINATION**

8 **JURISDICTION**

9 40. Jurisdiction is invoked pursuant to 28 U.S.C. § 1367 in that plaintiff's claim under
10 Washington law for employment discrimination because of disability is so related to plaintiff's
11 claims under the Americans With Disabilities Act that it forms part of the same case or
12 controversy under Article III of the United States Constitution.

13 **PARTIES**

14 41. Plaintiff incorporates paragraphs 3-4 by reference.

15 **FACTS AND VIOLATIONS OF THE WASHINGTON**
16 **LAW AGAINST DISCRIMINATION**

17 42. Plaintiff incorporates paragraphs 7-24, 26-27, 32-34, and 38 by reference.

18 43. Plaintiff Bargercon has a disability under the WALAD, that is, a sensory, mental or
19 physical abnormality that substantially limited his ability to perform his job.

20 44. Plaintiff Bargercon was and is qualified to perform the essential functions of his
21 job and other positions at Wal-Mart.

22 45. Plaintiff Bargercon gave defendant Wal-Mart notice of his disability and the
23 accompanying substantial limitations.

24 46. Defendant Wal-Mart failed, after notice described in the preceding paragraph, to
25 affirmatively adopt measures that were available to defendant to accommodate plaintiff's

1 disability.

2 47. Defendant Wal-Mart discriminated against plaintiff by failing to provide plaintiff
3 Bargeron with equal opportunities for advancement at Wal-Mart whether by increasing his
4 wages in his current position, promotion, or transferring to other positions at Wal-Mart.

5 48. As a result of defendant Wal-Mart's failure to accommodate his disability and
6 discrimination against him because of his disability, plaintiff has suffered emotional distress,
7 mental anguish and humiliation.

8 49. WHEREFORE, plaintiff Bargeron prays for the following relief against defendant
9 Wal-Mart:

10 1. A jury trial to determine the factual questions raised herein.

11 2. A declaratory judgment that defendant's above described acts have
12 violated plaintiff's rights under the WALAD;

13 3. A permanent injunction prohibiting defendant, its agents, assistants,
14 successors, and all persons acting in concert or cooperation with it or at its
15 direction or under its control from discriminating against plaintiff in violation of
16 the WALAD;

17 4. A money judgment against defendant, compensating plaintiff for all wages
18 and benefits—including loss of future earnings—plus interest, to which he would
19 have been entitled were it not for defendant's discrimination in violation of the
20 WALAD;

21 5. A money judgment against defendant for compensatory damages;

22 6. A money judgment against defendant for all costs and reasonable
23 attorney's fees incurred in the prosecution of this action; and

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25 ////

COMPLAINT --8

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1 7. All other relief that this Court may deem just and proper.

2 **DATED** this 1ST day of June, 2004.

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6 DAVID A. SNYDER, WSB No. 17849
7 Attorney for Plaintiff
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EEOC Form 161-A (3/98)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE
(CONCILIATION FAILURE)

To: Jack Bargeron
C/O David A. Snyder
4370 North East Halsey Street
#124
Portland, Oregon 97213

From: Seattle District Office
909 First Avenue
Suite 400
Seattle, WA 98104



On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR § 1601.7(a))

EEOC Charge No.

EEOC Representative

Telephone No.

380-2004-00348

Frances F. Palmer,
Enforcement Supervisor

(206) 220-6865

TO THE PERSON AGGRIEVED:

This Notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this Notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

Enclosure(s)


for Jeanette M. Leino,
District Director

MAR 4 2004
(Date Mailed)

cc: Naomi Berkowitz
THE GAITÁN GROUP, PLLC
WAL-MART
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Jack Bargeron
913 Ne 4th Ave.
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EXHIBIT

PAGE 1 OF 1